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In the Supreme Court of the United States

October Term, 1980

GEORGE FIRESTONE, Secretary of State, State of Florida; DOROTHY GLISSON, Director of Division of Elections, State of Florida, ROBERT HART, Chairman of Florida Elections Commission, ANNE E. KELLY, ROBERT H. HUCKSHORN, SAMUEL SHORESTIN and FLORENCE NEIDIG, Members of the Florida Elections Commission,
Petitioners,

vs.

DADE VOTERS FOR A FREE CHOICE a Political Committee and THE FLORIDA RESTAURANT ASSOCIATION, INC.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

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QUESTIONS PRESENTED

I.

WHETHER THE DECISION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT IS CORRECT WHILE THE CONFLICTING CALIFORNIA STATE COURT DECISION DEPARTS FROM SETTLED CONSTITUTIONAL PRINCIPLES.

II.

WHETHER THE LEGAL RATIONALE OF THE COURT OF APPEALS IN REJECTING THE "CASE OR CONTROVERSY" AND ABSTENTION ARGUMENTS ADVANCED IS CONSISTENT WITH OTHER DECISIONS AND IS IN ACCORD WITH THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

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STATEMENT OF THE CASE

The statement of the case contained within the Petition for Certiorari is essentially correct. However, the statement is misleading to the extent that it minimizes the extent of the controversy that existed between the State and the respondents and fails to fully portray the role the petitioners perform in enforcing Florida's election code. These facts are pertinent to the petitioners' arguments concerning case or controversy and abstention, in view of their insistence that no actual controversy existed because a state attorney was not named as a defendant.

Under Florida law, the Secretary of State is designated as the chief election officer, and, together with the Division of Elections and the Florida Elections Commission, is responsible for obtaining and maintaining uniformity in the application, operation and interpretation of election laws including investigation and determination of apparent or alleged violations of the Election Code.[1] Violation of Section 106.08, Florida Statutes, the invalidated contribution limitation, subjected an offender to public censure, civil and criminal penalties.[2]

Prior to instituting suit, the respondents sought to convince the state election officials that the decision previously reached in *Let's Help Florida v. Smathers*, 453 F. Supp. 1003 (N.D. Fla. 1978),[3] was controlling, and that the State should forbear from enforcing contribution limitations in countywide campaigns as well as in all statewide campaigns. The state officials refused the plaintiff's

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1. The election law duties of the Secretary of State, petitioner Firestone, are recited in Section 97.012, Florida Statutes. Petitioner Glisson heads the Division of Elections and the other petitioners comprise the Florida Elections Commission. The duties of the Division and the Commission in enforcing the challenged statute and receiving, investigation and making determinations pertaining to alleged or apparent violation of the statute are recited in Sections 106.22-106.27, Florida Statutes.

2. The Elections Commission is empowered to levy a civil penalty of $1,000 per violation of the election code. §106.265, Fla. Stat. Criminal violation is punishable by a $1,000 fine and imprisonment up to one year, §106.19(1), Fla. Stat. The Commission is obligated to issue a public report concerning its determination of violation, §106.12, Fla. Stat., and is authorized to institute a civil proceeding to recover three times the amount of any illegal contribution which exceeds a contribution limitation, §106.19(2), Fla. Stat.

3. The District Court decision in *Let's Help Florida* was issued in May, 1978 and invalidated the $3,000 contribution limitation pertaining to statewide referenda campaigns. In February, 1979 confronted with the $1,000 contribution limitation contained within the same statute pertaining to countywide campaigns, the respondents sought to convince the state that *Let's Help Florida* controlled and the statute should not be enforced. When the efforts proved unsuccessful suit was filed. The cases were consolidated on appeal.

request, and announced an intention to enforce the county-wide limitations pertaining to issue elections.

As noted by the Court of Appeals, the position of the state election officials was expressly stated to the district judge at the hearing on the application for preliminary injunction:

> Mr. Labasky:[4] . . . And basically that's the reason we are here today, because they have done it, and obviously the State must, at least, until enjoined, must begin to take its action.
>
> The Court: Has any action been taken?
>
> Mr. Labasky: Only to this point, Your Honor. Obviously we have just received the reports with respect to the statements that contribution limitations have been exceeded.
>
> The Court: But to put it to you another way, is there any ongoing State proceedings concerning this particular election or the committee, Dade Voters for Free Choice, Inc.?
>
> Mr. Labasky: Enforcement activity, Your Honor?
>
> The Court: Yes.
>
> Mr. Labasky: To my knowledge not at this point in time. But in the event that the injunction is found not to be warranted, there is the—the State would be compelled to begin those proceedings. (Record, Vol. III, at 41-42).

Thus, at the time of institution of the action in the District Court there was no pending state proceeding but threat of enforcement was real and immediate.

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4. Ronald Labasky appeared as counsel for the members of the Florida Elections Commission. His argument was adopted by the other defendants (Record, Vol. III, at 42).

SUMMARY OF ARGUMENT

In seeking certiorari review, the petitioners rely upon conflict between the decision of the Court of Appeals for the Fifth Circuit and a recent decision of the California Supreme Court. However, it is apparent that the decision of the Court of Appeals is correct while the state court decision departs from settled constitutional principles.

The conclusion reached by the Fifth Circuit was mandated by direct application of principles set forth in *Buckley v. Valeo*, 424 U.S. 1 (1976), and *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

The California state court decision on the other hand, is incompatible with principles expressly stated in those decisions. The state court incorrectly determined that government has a legitimate interest in equalizing the relative ability of individuals and groups to seek to influence the outcome of an election. Such a view intolerably places government in control of the quantity and range of debate on public issues in a political campaign and is therefore prohibited by the First Amendment.

The case or controversy and abstention arguments raised by the petitioners are of no merit whatsoever and do not warrant the attention of the Court.

ARGUMENT

REASONS FOR DENYING THE WRIT

I.

The Decision of the Court of Appeals for the Fifth Circuit Is Correct While the Conflicting California State Court Decision Departs From Settled Constitutional Principles.

It is not reasonable to argue that the decision of the Court of Appeals for the Fifth Circuit and the decision of the California Supreme Court in *Citizens Against Rent Control v. City of Berkeley*, 614 P.2d 742 (1980) are not in conflict. No significant distinction is apparent between the Florida Statute invalidated by the Federal Courts and the municipal ordinance upheld by the California state court.

Nevertheless, because of the lack of any serious question concerning the correctness of the Fifth Circuit decision there is not sufficient reason for the Court to review the decision on writ of certiorari.

The decision of the Court of Appeals is consistent with this Court's decisions in *Buckley v. Valeo*, 424 U.S. 1 (1976), and *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). The Court of Appeals correctly applied principles directly enunciated in those cases.[5]

The conclusion reached by the Fifth Circuit was mandated by subjecting justifications for the statute to First Amendment analysis within the framework of principles outlined in *Buckley* and *Bellotti*.

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5. These principles have been similarly applied by the Court of Appeals for the Second and Ninth Circuits. *See, Schwartz v. Romnes*, 495 F.2d 844 (2d Cir. 1974); *C & C Plywood Corp. v. Hanson*, 583 F.2d 421 (9th Cir. 1978).

The Court in *Buckley* upheld the Federal campaign act's $1,000 limitation upon contributions to candidates only upon determination that the actuality and appearance of corruption through possible expectancy of a *quid pro quo* was a constitutionally sufficient justification. *Buckley v. Valeo, supra* at 26. No other governmental interest in requiring contribution limitations met constitutional muster.[6]

In *Bellotti*, the Court held that the compelling interest in curtailing corruption was not existent in an issue campaign because there was no possibility of *quid pro quo* in the absence of a candidate:

> Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue. 435 U.S. at 790.

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6. Two other holdings in *Buckley* also demonstrate the narrow scope of the governmental interest in limiting contributions.

The Court invalidated the $1,000 expenditure limitation imposed upon independent expenditures relative to a clearly identified candidate. The Court did not consider large independent expenditures to offer the same danger of real or apparent corruption as contributions to a candidate, *Id.* at 46. The Court concluded that "[w]hile the independent expenditure ceiling thus fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process, it heavily burdens core First Amendment expression." *Id.* at 47-8. In invalidating the provision, the Court rejected the contention that the limitation was justified by a governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections. *Id.*

Moreover, in considering the disclosure requirement of the federal act, applicable to persons making contributions "'for the purpose of . . . influencing' an election or nomination" the Court noted that the language in question had a potential for "encompassing both issue discussion and advocacy of a political result . . . and could be interpreted to reach groups engaged purely in issue discussion." *Id.* at 79. To insure that the reach of the provision was "not impermissibly broad" the Court construed the language to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate. *Id.* at 80.

As the Court of Appeals correctly held, this Court in *Buckley* and *Bellotti* identified the only governmental interest sufficient to sustain a contribution limitation and determined that such an interest has no application in a referenda campaign.

On the other hand, the California decision cannot be reconciled with the analytical framework set forth in *Buckley* and *Bellotti*. The consideration which led the California court to sustain the Berkeley ordinance is incompatible with the First Amendment.

The point where the California court departs from the holdings of this Court, followed by the Fifth, Second[7] and Ninth Circuits,[8] is in its erroneous determination that government has a legitimate and compelling interest in equalizing the relative ability of individuals or groups to seek to influence the outcome of an election. The California court was misled by its well intentioned but dangerous concern that "domination of these [referendum] processes by large contributors leaves other citizens with a stilled voice in the very domain of our electoral system set aside for accomplishing the popular will." *Citizens Against Rent Control v. City of Berkeley, supra* at 746.

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7. "Whatever the justification for prohibiting contributions that are prone to create political debts, it largely evaporates when the object of prohibition is not contributions to a candidate or party, but contributions to a public referendum. The spectre of a political debt created by a contribution to a referendum campaign is too distant to warrant this further encroachment on First Amendment rights." *Schwartz v. Romnes, supra* at 852-3.

8. "The state interest in preventing corruption of officials which provided the basis for the Supreme Court's finding in *Buckley* that restrictions could permissibly be placed on contributions, is not at issue here. When corporations seek to influence the electorate and not an individual candidate or party, no such state interest exists because corporate activities cannot create political debts of the kind contemplated in *Buckley*. That a corporation's involvement may influence the vote provides no adequate reason to suppress corporate speech." *C & C Plywood Corp. v. Hanson, supra* at 425. (Citations omitted.)

The state court appears to accept the proposition that powerful presentation of an idea deprives the electorate of the ability to reach informed judgment:

> When large contributors use the power of their purse to overcome the power of reason, they thwart the intended purpose of the initiative or referendum: instead of fostering participation by a greater segment of the electorate, the vision of direct democracy is transformed into a tool of narrow interests.[9] 614 P.2d at 746.

Relying upon "commentators on our political scene," a "student of the California initiative process," and a Colorado "political scientist" rather than any evidence in the record, the state court adopted the view that the electorate required protection from initiative campaigning:

> The majority of people were interested in the issues and did have ideas on them. But on several proposals their ideas tended to reflect the latest polling techniques, campaign strategies and gimmicks of those with the most power and money. 614 P.2d at 747.

Undaunted by the spectre of government being empowered to decide which campaign activities involve "strategies and gimmicks", the California court upheld the Berkeley ordinance, determining that it served a compelling governmental interest by seeking "to reverse the trend toward loss of confidence in our political system and apathy in elections by assuring the voters that their vote

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9. Such a conclusion has obvious implications that reach far beyond contribution limitations upon referenda campaigns. Powerful voices, such as those of newspaper and television editors, public officials, civic and religious leaders, and entertainers are heard on many matters of public debate. Do these powerful voices "overcome the power of reason" and require limitation?

and their participation, whether in the form of money or services, are significant." *Id.* at 747-8.

The Fifth Circuit, relying on pronouncements of this Court, rejected similar arguments advanced by the State of Florida, that a contribution limitation operates to protect the electorate from "slick advertising campaigns" financed by "huge amounts of funds" from "inexhaustible reserves." As the Fifth Circuit noted, this Court has held that such considerations are barred by the First Amendment:

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive or unwise. In the free society ordained by our Constitution it is not government but the people—individually as citizens and collectively as associations and political committees—who must retain control over the quantity and range of debate on public issues in a political campaign . . . [T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments . . . if there be any danger that the people cannot evaluate the information and arguments advanced . . . it is a danger contemplated by the Framers of the First Amendment. *Buckley v. Valeo, supra* at 48-9, 57; *First National Bank of Boston v. Bellotti, supra* at 791-2.

The highly paternalistic view of the California court, rejected by the Fifth Circuit, that government must protect the citizen from being misled by sophisticated or

well financed presentation of ideas[10] presents a serious threat to democracy. For as Justice Jackson stated in *Thomas v. Collins*, 323 U.S. 516, 545 (concurring opinion) (1945):

> The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind . . . In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us.

The correctness of the Fifth Circuit in applying this well-settled principle of constitutional law provides sufficient basis for denial of the petition for certiorari.

II.

The Legal Rationale of the Court of Appeals in Rejecting the "Case or Controversy" and Abstention Arguments Advanced Does Not Conflict With Other Decisions and Is in Accord With the Accepted and Usual Course of Judicial Proceedings.

The "case or controversy" and abstention arguments urged by the petitioners offer no reason whatsoever for exercise of certiorari jurisdiction. In determining these issues, raised for the first time on appeal, the Court of Appeals correctly applied existing law.

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10. In *Bellotti*, in rejecting the state's argument that the prohibition upon corporate contributions to a referenda campaign should be sustained because "corporations are wealthy and powerful and their views may drown out other points of view," the Court stated: "To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it: The Constitution 'protects expression which is eloquent no less than that which is unconvincing.' " *Id.* at 790. (Citations omitted.)

The test applied by the Court of Appeals to determine the existence of a case or controversy was taken directly from decisions of this Court. The petitioners do not contend that an improper standard was utilized but appear to argue that the Court of Appeals erred in applying the standard to the facts of the case. No conflict of law having potential to affect future cases is alleged and therefore the matter would not merit this Court's attention through certiorari review even if the Fifth Circuit's determination were incorrect.

However, it is apparent that the Fifth Circuit correctly applied the legal standard. As the Court of Appeals noted, the petitioners have the statutory duty to enforce the election code and indicated an intention to do so.[11] The respondents desired to engage in activity directly proscribed by the statute in question. The committee had already received a few contributions larger than the statutory maximum, and other potential donors, including the co-respondent in this case, indicated they would make larger contributions if the law allowed them to do so. The election was only weeks away. A more imminent or concrete controversy is difficult to imagine.

The petitioners' abstention arguments are even more difficult to comprehend. The petitioners fail to offer any authority for application of abstention, much less demonstrate any reason for this Court to consider the matter by certiorari.

As this Court has noted, abstention from the exercise of federal jurisdiction " '. . . is an extraordinary and nar-

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11. The petitioners insist that since a state attorney was not named as a defendant there can be no case or controversy. This argument ignores, however, the primary role played by the Secretary of State, Division of Elections, and Election Commission in both the civil and criminal enforcement of the Election Code. *See,* FLA. STAT. ANN. §§106.22-106.27 (West).

row exception to the duty of a District Court to adjudicate a controversy properly before it'." *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813 (1976). The relevant principles of comity and federalism upon which *Younger v. Harris*, 401 U.S. 37 (1971) and its progeny are based "have little force in the absence of a pending state proceeding." *Lake Carriers' Assoc. v. MacMullan*, 406 U.S. 498, 509 (1972), cited in *Steffel v. Thompson*, 415 U.S. 452, 462 (1973). In the absence of a state proceeding, a plaintiff may challenge the constitutionality of a state statute in federal court, assuming the requirements for federal jurisdiction are satisfied. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 930 (1975). The Court of Appeals correctly applied these principles in rejecting the petitioners' request for abstention.

CONCLUSION

As set forth above, in view of the correctness of the decision of the Court of Appeals for the Fifth Circuit, the respondents respectfully request that the petition for Writ of Certiorari be denied. The Court may, however, wish to consider summary reversal or notation of probable jurisdiction in the appeal of the California Supreme Court decision in *Citizens Against Rent Control v. City of Berkeley, supra* (No. 80-737, Appeal docketed November 5, 1980), because of that decision's departure from decisions of this Court and conflict with decisions of the Courts of Appeal for the Second, Fifth and Ninth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari was mailed, postage prepaid, by U.S. mail this 26th day of January, 1981 to Anthony C. Musto, Esq., Assistant Attorney General, 401 N.W. 2nd Avenue, Suite 820, Miami, Florida 33128.

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